§ 11. *Application of Purchase-money.*—"It has long been settled that either upon a trust or a charge a purchaser is not bound to see that the money is applied either to the payment of debts generally, or to the satisfaction of legacies out of the surplus after the debts are paid. The reason is, that it would defeat a sale if the law obliged a purchaser to attend to the execution of a trust so indefinite as the payment of all debts, which he would have no means of ascertaining. Legacies out of the fund stand on the same footing, because the purchaser would necessarily have to go through the administration of the assets and see at his risk that the debts are paid before he could let the legatees have anything:" *Hauser* v. *Shore*, 5 Ired. Eq. 357, 362; 2 Williams on Ex'rs 935; *Elliot* v. *Merryman*, 1 Lead. Cas. in Eq. 59, 67, and note, p. 112. "Like reason doth make like law:" Broom's Maxims 154. Accordingly the same rule would seem to extend to administrators *c. t. a.*; *Evans* v. *Chew*, 8 Phila. 103; s. c. 71 Penn. St. 47, 51.

JAMES H. BROWN.

Denver, Col.

RECENT AMERICAN DECISIONS.

Supreme Court of Ohio.

ST. CLAIR STREET RAILWAY CO. *v.* EADIE.

A minor child, who being *sui juris* as to a reasonable care of her person and safety lawfully and properly enters into a conveyance driven by her parent, and without fault on her part is injured by the negligence of the driver of another vehicle, is not prevented from recovering damages against the proprietor of the latter vehicle, because her parent has by his negligence contributed to the injury.

Transfer Co. v. *Kelly*, 36 Ohio St. 86, followed. *Thorogood* v. *Bryan*, 8 C. B. 115, disapproved.

ERROR to the District Court of Cuyahoga County.

This was an action for damages for an injury alleged to have been caused by defendants' negligence. The plaintiff was a minor, aged sixteen years, and was fully capable of taking reasonable care of herself. She was lawfully riding with her father, who was driving his own wagon, when she was injured by a collision between the wagon and a street-car, caused by the mutual and concurring negligence of a street-car driver and her father, but without any fault or negligence on her part. The court below held that the negligence

of her father was not to be imputed or attributed to her, and did not bar a recovery against the street-car company, whose negligence directly contributed to the injury. The street-car company took this writ of error.

The opinion of the court was delivered by

JOHNSON, J.—The plaintiff, though a minor, was sixteen years old, and was, therefore, *sui juris*. She was fully capable of taking care of herself. Had her negligence or misconduct contributed to her injury, she could not recover, though the company was also guilty. The question fairly presented, therefore, is, whether a minor child, who being *sui juris* as to a reasonable care of her person and safety, lawfully and properly enters into a conveyance with her parent, and without fault on her part is injured by the negligence of a street railroad company, is prevented from recovering against such negligent company because her parent has, by his negligence, contributed to the injury. In *Transfer Co.* v. *Kelly*, 36 Ohio St. 86, this court held that the concurrent negligence of a street-car company, whose passenger the plaintiff was, with that of a transfer company, whereby there was a collision between the wagon of the latter with the car of the former, cannot be imputed to the passenger, so as to charge him with contributory negligence. In that case, as in this, the plaintiff was not in fault; but there, as here, it was contended that the plaintiff was so identified with, or related to, the railroad company by the contract of carriage that the fault of the carrier must be imputed to the passenger. Neither in that case nor in this was there any fault alleged against plaintiff for becoming a passenger. The two cases differ in two respects only. There the carriage was by a public carrier, presumably for hire or reward, while here it was by private conveyance, and presumably gratuitous. There the driver of the street-car was a stranger to the passenger, while here he was her father, with whom she was riding home. In that case it was held that the driver in the street-car was in no just sense the agent or servant of the passenger. If the driver had been under the control of the passenger, then it was said there might be some show of reason for holding the passenger liable for the negligence of the driver. But as there was no such power of direction or control, the negligence of the driver of the car could not be imputed to the passenger. That was held to be a case of joint negligence of the railroad company and the transfer company, for which they might be sued jointly or severally.

After a thorough examination of the numerous and conflicting authorities upon this point, some of which are cited in the opinion, we then declined to follow the case of *Thorogood* v. *Bryan*, 8 C. B. 115, and other like cases, which holds the passenger liable for the contributory negligence of his driver, where there was mutual fault of two drivers causing an injury, and, as before stated, held that upon principle, as well as upon the better authorities, the passenger was not so identified with the vehicle in which he was riding as to make him responsible for the driver's fault. It was held by us that the passenger in that street-car was not responsible for the negligence of the driver; that the latter was in no just sense the agent of the former, and had no control of, or direction over, the management of the vehicle in which he was riding, so as to identify driver and passenger.

The opposite doctrine, though supported by high authority, has not been received even in England with approbation.

We cite a few of the cases and text-books touching this vexed question, but, since the subject was fully considered in *Transfer Co.* v. *Kelly*, *supra*, we need not further consider it. See *Armstrong* v. *Lancashire Ry. Co.*, L. R., 10 Exch. 47; *Waite* v. *N. E. Rd.*, El., Bl. & El. 719 (a case of a child too young to take care of itself); *Lockhart* v. *Lichtenthaler*, 46 Penn. St. 151; Thompson on Carriers of Passengers, c. 7, where all the cases *pro* and *con* are cited, notes, p. 284; *Bennett* v. *N. J. Rd.*, 36 N. J. L. 221; 1 Smith's Lead. Cases (8th Am. ed.) p. 505, *315; *Danville Turnpike Co.* v. *Stewart*, 2 Met. (Ky.) 119; *Chapman* v. *N. H. Rd. Co.*, 19 N. Y. 341; *Colegrove* v. *N. Y. & N. H. Rd. Co.*, 20 Id. 492; *Louisville, etc., Rd.* v. *Case's Adm'r*, 9 Bush (Ky.), 728; Wharton on Neg. § 395; *Webster* v. *H. R. Rd. Co.*, 38 N. Y. 260.

The foregoing cases mostly relate to passengers by public carriers, and when the passenger is injured by the negligence of another public carrier, or of a third person.

It only remains to determine if a like rule applies when the plaintiff was passenger in a private conveyance. We think it does. The plaintiff in the case at bar was in no just sense the master, nor was her father her agent or under her control or direction. In *Puterbaugh* v. *Reasor*, 9 Ohio St. 484, the want of ordinary care of plaintiff's agent prevented his recovery, when the agent's negligence directly contributed to the injury, though the defendant was also guilty. But it is well settled that passengers in a public convey-

ance are not so liable for the negligence of the employees of the carrier, because they are not the agents of the passenger. The same reasons apply with equal force to a private carrier. Plaintiff's relations to her father being that of a passenger in his wagon, going to their common home, did not, in law, make him her servant or agent, and as such responsible for his misconduct. If he had brought an action for the loss of services of his daughter, caused by this injury, his contributory negligence would defeat a recovery, nor could he recover for his own injuries for the same reason. This is because he was guilty with the defendant of causing the collision. Neither does the fact that she was the daughter defeat her rights. If her father's misconduct or negligence contributed to the injury, why should that fact exonerate a joint wrongdoer? *Robinson* v. *N. Y. Cent. Rd.*, 66 N. Y. 11, was the case of a female who had accepted an invitation to ride with a gentleman, who was the owner and driver of a buggy in which they were riding, when she was injured through the joint negligence of her driver and a train of cars. CHURCH, C. J., says: "I am unable to find any legal principle upon which to impute to plaintiff the negligence of the driver. * * * The acceptance of an invitation to ride creates no more responsibility for the acts of the driver, than the riding in a stage coach, or even a train of cars, providing there was no negligence on account of the character or condition of the driver or the safety of the vehicle, or otherwise. It is no excuse for the negligence of defendant that another person's negligence contributed to the injury for whose acts the plaintiff was not responsible."

We think this reasoning unanswerable, notwithstanding the adverse criticism and contrary holding in *Prideaux* v. *City of Mineral Point*, 43 Wis. 513. This doctrine of "imputed negligence" and the reasons for its application were considered in *B. & I. Rd. Co.* v. *Snyder*, 18 Ohio St. 399. That was the case of a child six years old, and the negligence of the parent or custodian of the child did not prevent its recovery against one also guilty. The court say the rule that contributory negligence bars a recovery is founded on, 1. The mutuality of the wrong; 2. The impolicy of allowing a party to recover for his own wrong; and 3. The policy of making personal interests of parties depend on their own prudence and care. It was said all these were wanting in the case then before the court. With equal truth it can be said that all these rea-

sons are wanting in the present case, where it is conceded the plaintiff was in no fault. Whether in this case the father would have been jointly liable with defendant, we need not now determine. By the well-settled rule of law he would be, unless his relation to her modifies this rule, for his culpable negligence, she being *sui juris* and not guilty of want of proper care for her own safety: *Boyd* v. *Watt*, 27 Ohio St. 259; Whart. on Neg. § 144; Shear. & Redf. on Neg. § 58.

If it be conceded that he would not be so liable, either by reason of his parental relation or that it was a gratuitous service, that would not excuse the negligence of the defendant, nor bar the plaintiff, who was free from fault, from recovering from the other wrongdoer, whose negligence was a proximate cause of injury.

Judgment affirmed.

As is well known to the profession, the English case of *Thorogood* v. *Bryan*, 8 C. B. 114, 122, holds a different doctrine from that of the principal case. In that case it is held that a passenger upon an omnibus of a common carrier who receives injuries caused from the concurring negligence of such carrier and a third person, is not entitled to recover damages from the third person, for the reason that the passenger is so identified with the carrier and his servants, that the negligence of the carrier is to be imputed to the passenger, *i. e.*, that such passenger contributed to his own injury. This doctrine has been expressly repudiated in a number of well-considered cases in this country: nor has it been received with approbation in England: *Waite* v. *North Eastern Ry.*, El., Bl. & El. 728: *Tuff* v. *Warman*, 2 C. B. (N. S.) 750.

In *The Milan*, 1 Lush. 388, 403, the judge of the High Court of Admiralty, in speaking of *Thorogood* v. *Bryan*, said: "With respect to the judges who decided that case, I do not consider that it is necessary for me to dissect the judgment, but I decline to be bound by it, because it is a single case: because I know, upon inquiry, that it has been doubted by high authority: because it appears to me not reconcilable with other principles laid down at common law: lastly, because it is directly against *Hay* v. *Le Neve*, 2 Shaw's S. C. App. 405, and the ordinary practice of the Court of Admiralty."

Greenland v. *Chaplin*, 5 Exch. 242, and *Rigby* v. *Hewitt*, Id. 240, cases decided after *Thorogood* v. *Bryan*, do not follow the doctrine of the latter case.

In a note to *Ashby* v. *White*, 1 Smith's Lead. Cas. (6th Am. ed.) 450, we find the following: "If two drunken stage-coachmen were to drive their respective carriages against each other, and injure the passengers, each would have to bear the injury of his own carriage, no doubt; but it seems highly unreasonable that each set of passengers should, by a fiction, be identified with the coachman who drove them so as to be restricted for remedy to actions against their own drivers or his employer. This, nevertheless, appears to be the result of the decision in *Thorogood* v. *Bryan*, 8 C. B. 115, but it may be questioned whether the reasoning in that case is consistent with with those of *Rigby* v. *Hewitt*, 5 Exch. 240, and *Greenland* v. *Chaplin*, Id. 243, or with the series of decisions from *Quarman* v. *Burnett*, 6 M. & W. 499, to *Reedie* v. *London, &c., Ry.*, 4 Exch. 244, and *Dalyell* v. *Tyrer*, 28 L. J. (Q. B.)

52. Why in this particular case both wrongdoers should not be considered liable to a person, free from all blame, not answerable for the acts of either of them, and whom they have both injured, is a question which seems to deserve more consideration than is received in *Thorogood* v. *Bryan*."

Child v. *Hearn*, L. R., 9 Exch. 176, 182, and *Armstrong* v. *Lancashire, &c., Ry.*, L. R., 10 Id. 47; s. c. 44 L. J. (Exch.) 89, seem to approve of the doctrine of "anomalous identification" of *Thorogood* v. *Bryan*.

The doctrine of *Thorogood* v. *Bryan*, rests on the ground that the plaintiff having voluntarily trusted himself on the omnibus, had so identified himself with its management, that the driver's negligence deprived him of any right of action against the owner of the other vehicle.

The general principle applicable is that the contributory negligence of a third person does not constitute a defence, unless such negligence is imputable to the plaintiff: *Burrows* v. *March Gas & Coke Co.*, L. R., 5 Exch. 67; *Sheridan* v. *Brooklyn, &c., Rd.*, 36 N. Y. 39; *Cayzer* v. *Taylor*, 10 Gray 274; *Mott* v. *H. R. Rd.*, 8 Bosw. 345. Such contributory negligence is not to be imputed to the plaintiff, unless such third person is under his direction or control, as agent or servant. This doctrine rests on the familiar maxim, "*qui facit per alium, facit per se*," and is just. When this relation of principal and agent, or master and servant is complete, the contributory negligence of such agent or servant is always to be imputed to his principal or master. *Puterbaugh* v. *Reasor*, 9 Ohio St. 484, well illustrates this rule. There the injury resulted from the concurring negligence of two servants, one being the servant of the plaintiff. The plaintiff was not permitted to recover for the reason that his servant, over whom he had control, contributed to the injury, such negligence being fairly imputed to him; see *Otis* v. *Thom*, 23 Ala. 469.

The doctrine of *Thorogood* v. *Bryan*, *supra*, seems to have been adopted in Pennsylvania in *Lockhart* v. *Lichtenthaler*, 46 Penn. St. 151, 165. There the injury resulted from the mutual negligence of the servants of both vehicles, the one in which plaintiff was riding, being a public conveyance, he having no control over the driver of it, yet the court held that his driver alone was responsible for the injury. But while adopting the doctrine, the court refused to follow the reason of the English case. THOMPSON, J., said: (p. 164) "I would say the reason for it, that it better accords with the policy of the law to hold the carrier alone responsible in such circumstances as an incentive to care and diligence. As the law fixes the responsibility upon a different principle in case of the carrier, as already noticed from that of a party who does not stand in that relation to the party injured, the very philosophy of the requirement of greater care is that he shall be answerable for omitting any duty which the law has defined as his rule and guide, and will not permit him to escape by imputing negligence of a less culpable character to others, but sufficient to render them liable for the consequences of his own. It would be altogether more just to hold liable him who has engaged to observe the highest degree of diligence and care and has been compensated for so doing, rather than upon him upon whom no such obligation rests, and who not being compensated for the observance of such a degree of care, acts only on the duty to observe ordinary care, and may not be aware even of the presence of a party, who might be injured. This rule, it cannot be doubted, will be more likely to increase diligence than the opposite, which would enable a negligent and faithless party to escape the consequences of his want of care by swearing it on another, which he would assuredly do if the temp

tation and opportunity offered. As this view accords best with the policy of the law, it is proof of the existence of the rule itself." The court after reviewing fully the decisions concludes that the clear preponderance is in favor of the doctrine that mutual negligence in case of an injury to a third person is a defence.

In Pennsylvania this doctrine was again affirmed in *Phila. & Reading Rd.* v. *Boyer*, 97 Penn. St. 91, 100, where death was caused by collision of a street car that deceased was on, and a locomotive of defendant. The court stated that the success of the action depended upon two assumptions: (1) That death resulted directly from the carelessness of the defendants' servants: (2) That the person in charge of the street-car was chargeable with no negligence. "It is on this hypothesis that suit can be maintained, for the rule is, that where a passenger on a carrier vehicle is injured by a collision resulting from the mutual negligence of those in charge of it, and another party, the carrier alone must answer for the injury: *Lockhart* v. *Lichtenthaler*, *supra*.

But the better rule is that where the negligence is joint, he may recover from either, or both. This rule is supported by the weight of authority: *Colegrove* v. *Rd.*, 20 N. Y. 492; s. c. 6 Duer 382; *Webster* v. *Hudson*, 38 N. Y. 260; *Davey* v. *Chamberlain*, 4 Esp. 229; Wharton on Neg. § 395; *Barrett* v. *Rd.*, 45 N. Y. 628. *Danville, &c., Tp.* v. *Stewart*, 2 Met. (Ky.) 119, lays down the rule that where an injury is occasioned by the negligence of two persons, the fault of one is no excuse for that of the other. Both in such case are liable to the party injured; following the principle of this case is *Louisville, &c., Rd.* v. *Case*, 9 Bush (Ky.) 728, 735.

In *Tomkins* v. *Clay Street Hill Railroad Co.*, 4 West Coast Rep. 537; s. c. 4 Pac. Rep. 1165, plaintiff was injured by being thrown from a street-car which collided with another. The servants of both cars were responsible for the accident. It was held that plaintiff could recover from either or both companies, and where both are sued, the plaintiff may ordinarily dismiss as to either, and, if it turns out at the trial that one was not guilty of negligence, he may, on sufficient evidence, take a verdict against the other; but satisfaction received from one company, is a bar to an action against the other. The court said: "Every party contributing to the injury of plaintiff was liable to the full extent of damages by her sustained. Her injuries gave her but a single cause of action. * * * Damages resulting from the same wrongful transaction are ordinarily inseperable; she could not recover part from one and part from the other defendant:" *Urton* v. *Price*, 7 Pac. C. L. J. 82; 57 Cal. 272; Cooley on Torts 139.

Chapman v. *New Haven Rd.*, 19 N. Y. 341, is against *Thorogood* v. *Bryan*, also. The plaintiff was a passenger on a New York and Harlem train. The injury occurred by collision of his train with another train, through concurring negligence of the managers of the respective trains. It was held that the passenger was not so identified with the proprietors, or their servants, of the train conveying him as to be responsible for negligence on their part, and therefore he could recover from defendant. Referring to *Thorogood* v. *Bryan*, JOHNSON, C. J., said (p. 344), "But I do not see the justice of the doctrine in connection with the case before us. It is entirely plain that the plaintiff has no control, management, even no advisory power over the train on which he was riding. Even as to selection he has the choice of going by that railroad or none. To attribute to him therefore the negligence of the agents of the company and thus bar him of a right of recovery is not applying any existing exception to the general rule of law, but is framing a new exception which does not in fact rest upon the reason of the origi-

nal exception, and is based on fiction and inconsistent with justice."

We find a still stronger denunciation of the doctrine of *Thorogood* v. *Bryan* in *Bennett* v. *N. J. Rd. & Tr. Co.*, 36 N. J. L. 225. The plaintiff while riding on a street car was injured by carelessness of engineer of defendant and contributory negligence of driver of street car. The plaintiff was held entitled to recover. BEASLEY, C. J., in referring to *Thorogood* v. *Bryan*, said, "This case stands, I think, in point of principle, alone in the line of English decisions, and the grounds upon which it rests seem to me inconsistent with familiar rules. The reason given for the judgment is, that a passenger in the omnibus must be considered as identified with the driver of the omnibus in which he is voluntarily a passenger, and that the negligence of the driver is the negligence of the passenger. But I have entirely failed to perceive how it is that the passenger in a public conveyance becomes identified, in any legal sense, with the driver of such conveyance. Such identification could result only in one way; that is, by considering such a driver the servant of the plaintiff. I can see no ground upon which such relationship is to be founded. In a practical point of view it certainly does not exist. The passenger has no control over the driver or agent in charge of the vehicle. And it is this right to control the conduct of the agent, which is the foundation of the doctrine that the master is to be affected by the acts of his servants. To hold that the conductor of a street car or a railroad train is the agent of the numerous passengers who may chance to be in it, would be a pure fiction. In reality there is no such agency, and if we impute it, and correctly apply legal principles, the passenger, on the occurrence of an accident from the carelessness of the person in charge of the vehicle in which he is being conveyed, would be without any remedy. It is obvious in a suit against the proprietor of the car in which he was a passenger, there could be no recovery if the driver or conductor of such car, is to be regarded as the servant of such passenger. And so, on the same ground, each passenger would be liable to every person injured by the carelessness of such driver or conductor; because if the negligence of such agent is to be attributed to the passenger for one purpose, it would be entirely arbitrary to say that he is not to be affected by it for other purposes. * * The doctrine of the English case appears to convert the driver of the omnibus into the servant of the passenger for the single purpose of preventing the passenger from bringing suit against a third party whose negligence had co-operated with that of the driver in the production of the injury. I am compelled to dissent from such a position. Under the circumstances in question, the passenger is a perfectly innocent party, having no control over either of the wrongdoers; and I can see no reason why according to the usual rule an action will not lie in his behalf against either or both of the employers of such wrongdoers."

Louisville, &c., Rd. v. *Case's Adm'r*, 9 Bush (Ky.) 728, holds a contrary doctrine from *Thorogood* v. *Bryan*. Here the passenger was in a street-car and lost his life by collision of his car with a railroad train of defendant, occasioned by concurring negligence of the driver of street-car and the servants of defendant. There was a recovery, as the driver was held not to be a servant of the passenger, nor subject to his government or control. In this case it was said (p. 735), "Notwithstanding the driver of the street-car may have recklessly driven across the track of the railroad company in dangerous proximity to the moving train, still the servants of the company, so soon as it became apparent that he intended to do so, were under obligations to the passengers on the street-car to use all proper efforts to arrest the progress of the train, and prevent, if possible, the

collision; but as it is much more difficult to control the movements of a heavy train of cars than to check a single street-car drawn by mules or horses, the employees of the railroad company could not anticipate that the driver of the street-car would attempt to cross the street in the face of the advancing train, and consequently could not be expected to take steps to arrest an unexpected danger until it became manifest that the driver intended to act contrary to the course usually adopted by persons of reasonable prudence under like circumstances. But the negligence of the driver will not excuse negligence on the part of the railroad employees. If the life of Case was destroyed by the concurrent negligence of two or more persons, none of whom were acting as his agent or servant, nor subject to his government or control, all the employers of the guilty agents may be held responsible for the injury, and one cannot plead the negligence of the servants of the other as matter of defence in an action against himself. This doctrine was announced by this court in *Stewart's Case*, 2 Met. (Ky.) 119, and it is in harmony with the reason of the law, and we are not inclined to depart from it, although a different rule appears to have been followed in one English and a few American cases."

In *Cuddy* v. *Horn*, 46 Mich. 596, (s. c. 21 Am. L. Reg. N. S. 302, and note), the injury was caused by collision of two steamers, through mutual negligence of managers of each. One of the vessels had been chartered, but the charterer did not control the movements of the boat. The action was against the owners of both vessels, and was sustained, citing *Colegrove* v. *Rd.*, 20 N. Y. 492; *Cooper* v. *E. T. Co.*, 79 Id. 116; *Hillman* v. *Newington*, 57 Cal. 56.

PRIVATE CONVEYANCES.—Many cases have made a distinction between public and private conveyances, but others have refused to recognise any difference in the principle of the doctrine.

The grounds for this distinction are well stated by RYAN, C. J., in *Prideaux* v. *Mineral Point*, 43 Wis. 513, 526. In that case plaintiff was riding in a private conveyance at the invitation of the driver, and it was held that the driver was the agent of the plaintiff whose negligence was imputable to him. RYAN, C. J., said (p. 528), "One in a private conveyance voluntarily trusts his personal safety in the conveyance to the person in control of it. Voluntary entrance into a private conveyance adopts the conveyance for the time being as one's own, and assumes the risk of the skill of the person guiding it. *Pro hac vice*, the master of a private yacht or the driver of a private carriage is accepted as agent by every person voluntarily committing himself to it. When *pater familias* drives his wife and child in his own vehicle he is surely their agent in driving them, to charge them with negligence. It is difficult to perceive on what principle he is less the agent of one who accepts his or their invitation to ride with them. There is a personal trust in such cases, which implies an agency. So, several persons voluntarily associating themselves to travel together in one conveyance, not only put a personal trust in the skill of that one of them whom they trust with the direction and control of the conveyance, but appear to put a personal trust each in the direction of each against negligence affecting the common safety. One enters a private conveyance in some sort of free choice; voluntarily trusting to its sufficiency and safety. It appears absurd that one voluntarily choosing to ride in a private conveyance trusts to the sufficiency of the highway, to the care and skill exercised in all other vehicles upon it, to the care and skill governing trains at railroad crossings, to the care and skill of everything except that which is most im-

mediately important to himself, and trusts nothing to the sufficiency of the very vehicle in which he voluntarily travels, nothing to the care and skill of the person in charge of it. His voluntary entrance is an act of faith in the driver; by implication of law he accepts the driver as his agent to drive him. In the absence of express adjudication, the general rules of implied agency appears to sanction this view." See *Houfe* v. *Fulton*, 29 Wis. 296. *Otis* v. *Janesville*, 47 Id. 422, follows *Prideaux* v. *Mineral, Point, supra*, and holds that the contributory negligence of the driver of a private conveyance in which a person is voluntarily riding at the time of receiving an injury from a defective highway, is imputable to the person so injured, to prevent a recovery.

This distinction has also been taken in Michigan. In *Lake Shore, &c., Rd.* v. *Miller*, 25 Mich. 274, 287, a female servant was riding with her employer in his wagon, which was wrecked by a railroad train of defendant. The driver of the wagon appeared to have been guilty of negligence directly contributing to the injury against which the plaintiff warned him. This negligence was held to be imputed to the plaintiff, so as to preclude a recovery.

Iowa has also adopted this rule. In *Payne* v. *C., R. I. & P. Rd.*, 39 Iowa 523, the action was for injuries received at a railroad crossing of defendant by collision of a wagon with defendants' train. The wagon was driven by a third person and plaintiff was a voluntary passenger therein. It was held that the plaintiff was bound to rely upon the diligence of the driver for a recovery.

This distinction was adopted in one New York case—*Brown* v. *N. Y. Cent. Rd.*, 31 Barb. 385—but denied in others. In *Robinson* v. *N. Y. & H. R. Rd.*, 66 N. Y. 11, a female accepted an invitation to ride in a buggy with a person who was entirely competent to manage the horses. While crossing the defendant's railroad track the buggy collided with defendant's train. It was held that if she was free from negligence herself, she was entitled to recover, although the driver might be guilty of negligence which contributed to the injury. This case is criticised by RYAN, C. J., in *Prideaux* v. *Mineral Point, supra*.

The New York case, *Robinson* v. *Rd. supra*, is approved in *Dyer* v. *Erie Ry.* 71 N. Y. 228. In that case plaintiff was injured while crossing defendants' railroad track in a public thoroughfare, while riding by permission and invitation of a third person, the owner of the horses and wagon driven. It was held that as no relationship of principal and agen arose between the plaintiff and the driver of the vehicle, the former was not responsible for the negligence of the latter, where he himself is not chargeable with negligence, and where there is no claim that the driver was not competent to control and manage the train. This case affirms that of *Robinson* v. *Rd., supra*, and puts this principle at rest in New York.

In *Metcalf* v. *Baker*, 11 Abb. Pr. Rep. (N. S.) 431; s. c. 2 Jones & Sp. 10, plaintiff was riding gratuitously in A.'s carriage, who was driving at the time of the accident, which was caused by collision of A.'s carriage with defendant's wagon, which was driven by defendant's servant. Both drivers contributed to the injury. The plaintiff was held entitled to recover, citing and approving *Colegrove* v. *N. Y. & H. R. Rd.*, 6 Duer 382; s. c. 20 N. Y. 492.

In *Knapp* v. *Dagg*, 18 How. Prac. 165, plaintiff was riding as a passenger in her brother's wagon, when they met and collided with the defendant's wagon, she being thrown out and injured, the accident being occasioned by mutual negligence of both drivers, without any blame on part of plaintiff unless in riding with a careless driver. She was held not to be chargeable with the negligence of her driver. The court said (p. 165): "The

plaintiff is not chargeable with the negligence of the driver of the team after which she rode. She could have sued him for the injury she has sustained. The defendant is guilty of injuring her as well as he is. They have severally wronged her. She might sue either." It was said in *Brown* v. *Rd.*, *supra*, that this case was not good law, but *Robinson* v. *Rd. supra*, and *Dryer* v. *Erie Ry.*, *supra*, settle the rule this way in N. Y.

The principal case fully sustains the New York rule.

EUGENE MCQUILLEN.

[Since the receipt of the above note a decision of the Court of Errors and Appeals of New Jersey has been published in which that court also declines to adopt the rule laid down in *Thorogood* v. *Bryan*. See *N. Y., L. E. & West. Rd.* v. *Steinbrenner*, 18 Vroom 161, *ante*, p. 684.—ED.)

Supreme Court of Indiana.

GLIDDEN *v.* HENRY.

A promissory note containing the clause, "the drawers and endorsers * * * expressly agree that the payee or his assignees may extend the time of payment thereof from time to time, indefinitely, as he or they may see fit," is non-negotiable.

APPEAL from Henry Circuit Court.

Millett & Bundy, for appellant.

J. M. Morris, for appellee.

The opinion of the court was delivered by

ZOLLARS, J.—For value, and before maturity, appellee became the owner of two promissory notes executed by appellant, one of which is as follows:

$750. New Castle, Ind., April 14th 1883.

Twelve months after date we, or either of us, promise to pay to the order of George W. Nugen, Jr., seven hundred and fifty dollars, with interest at the rate of seven per cent. per annum, after date, until paid, and attorney fees, value received, without any relief whatever from valuation or appraisement laws, with eight per cent interest from maturity. The drawers and endorsers severally waive presentment for payment, protest and notice of protest and non-payment of this note, and further, expressly agree that the payee or his assignees may extend the time of payment thereof from time to time, indefinitely, as he or they may see fit, and receive interest in advance, or otherwise, from the maker or endorsers, for any extension or forbearance so made. Negotiable and payable at the Citizens' State Bank of New Castle. J. W. GLIDDEN.